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No. 91-1124

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE HAVASUPAI TRIBE, a federally recognized Indian Tribe, et al., Petitioners,

v.

THE UNITED STATES OF AMERICA, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ENERGY FUELS NUCLEAR, INC. AND ENERGY FUELS EXPLORATION COMPANY IN OPPOSITION

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March 11, 1992

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QUESTIONS PRESENTED

1. Whether the Havasupai Tribe has an aboriginal property right of "access" to Forest Service land which was preserved by the Grand Canyon National Park Enlargement Act, 16 U.S.C. § 228, et seq., and which allows the Havasupai Tribe to bar the operation of a mine on valid mining claims in the Kaibab National Forest.

2. Whether, in a suit seeking judicial review of administrative agency action, the district court properly denied petitioners' motion to conduct discovery into matters beyond the administrative record presented to the court.

LIST OF PARTIES

Energy Fuels Nuclear, Inc. and Energy Fuels Exploration Company are respondents in this case, in addition to those named in the caption. Both Energy Fuels Nuclear, Inc. and Energy Fuels Exploration Company are wholly owned by Energy Fuels Mining Joint Venture. Neither Energy Fuels Nuclear, Inc. nor Energy Fuels Exploration Company has any subsidiaries other than wholly owned subsidiaries.

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Respondents Energy Fuels Nuclear, Inc. and Energy Fuels Exploration Company ("Energy Fuels") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 943 F.2d 32 (1991).

STATEMENT OF THE CASE

This case concerns the petitioners' ("the Tribe" or "the Havasupai") attempt to prevent Energy Fuels from completing and operating a mine ("the Canyon Mine") on mining claims it controls in the Kaibab National Forest in Arizona. The Havasupai claim that the mine is located in a sacred religious area. The mine occupies about 17 acres of land, and is 35 miles from the Havasupai Reservation. Pet. App. a-18. During most of this case, the Havasupai's main arguments against the mine were that it would violate their First Amendment right of religious freedom and that the environmental impact statement prepared by the Forest Service for the mine project did not comply with the National Environmental Policy Act ("NEPA"). Pet. 6. They have now abandoned those arguments. Id. ii-iii.

The Tribe's sole remaining substantive argument against the mine is the claim that it violates their asserted aboriginal right of "access" to the mine area. This right is supposedly preserved by the Grand Canyon National Park Enlargement Act. The Havasupai's other argument is procedural. They claim that the district court committed reversible error by not allowing them to conduct open-ended discovery for the purpose of seeing if the administrative record was complete. The district court denied their motion to do discovery because they made no showing of any incompleteness or inadequacy in the record.

The Havasupai lived in a large area south of the Grand Canyon until 1880 when the federal government created the Havasupai Reservation and excluded them from the remainder of what had been their aboriginal land. Pet.

App. a-24, a-26. Subsequently, the Havasupai's aboriginal land (outside of the reservation) was incorporated into a forest reserve (1893), the Coconino National Forest (1908), and the Kaibab National Forest (1934), as well as the Grand Canyon National Park. Id. a-27.

In 1951, the Tribe filed a claim with the Indian Claims Commission, seeking compensation for their aboriginal land which the federal government had taken from them. Id. a-28. The Havasupai declared to the Indian Claims Commission:

> In 1880 the [United States] acquired all of the petitioner's lands outside of its reservation and converted these lands to use by others and deprived petitioner of their title to these lands.

Supp. E.R. A500 (emphasis added).[1] See also Pet. App. a-28.

After a full evidentiary hearing, the Indian Claims Commission ruled in favor of the Havasupai, holding that "by establishing a reservation for the [Havasupai] on June 8, 1980 and March 3, 1882, the United States wrongfully took [Havasupai] aboriginal title lands without payment of compensation therefore . . ." The Havasupai Tribe v. United States, 20 Ind. Cl. Comm. 210, 220 (1968) (quoted in Pet. App. a-29). The Indian Claims Commission further ruled that by its actions, "the [United States] had extinguished the [Havasupai Tribe's] title to [its] lands" outside the Havasupai Reservation. The Havasupai Tribe v. United States,

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[1] Appellees' Joint Supplemental Excerpts of Record, submitted to the Ninth Circuit by Energy Fuels and the Federal Appellees, is hereby referred to as "Supp. E.R. A___."

21 Ind. Cl. Comm. 324 (1969) (Supp. E.R. A515) (emphasis added). Pursuant to the final judgment of the Indian Claims Commission, in 1969 Congress paid compensation to the Havasupai for their land that the federal government had taken from them. Pet App. a-39 to a-40. Energy Fuels' mine is located on land taken by the government in 1880 and for which the Havasupai received compensation from Congress. Id. a-24.

Mining exploration began at the mine site in 1977. Id. a-94. Between 1978 and 1985, substantial exploration work and disruption to the site occurred, including the drilling of 38 exploration holes. Supp. E.R. A420-27. The mine site was also investigated by archeologists in connection with the exploration activity. Pet. App. a-94. "For eight years all exploration activity and archeological work occurred without comment

or expressed opposition by the Havasupai . . . " Id.

In October 1984, Energy Fuels submitted its mining proposal to the Forest Service. Id. Subsequently, an exhaustive investigation into the mine's potential impact on the environment was undertaken and a detailed environmental impact statement ("EIS") was prepared, in compliance with NEPA. Id. a-17 to a-21. The Forest Service communicated frequently with the Havasupai and solicited comments from them, but received virtually no response during most of the NEPA process. Id. a-95 to a-103.

In 1985, Energy Fuels representatives met with Havasupai leaders for two days at Supai Village on the Reservation to discuss the proposed mine in detail. The Havasupai did not say anything at the meeting about the

mine site having any cultural or religious significance. Id. a-100 to a-101.

The Havasupai's only statement during the NEPA process about the mine site's supposed religious significance was the assertion that traditional camps and burial grounds were located in the "area" of the mine. Id. a-104. In response, the Forest Service immediately wrote to the Havasupai asking for more information. The Havasupai never identified any specific religious sites that might be affected by the mine Id. a-106 to a-110.

The Forest Service arranged a meeting with Havasupai representatives at the mine site, but the Tribe cancelled the meeting and it was never held. Id. a-108. The Forest Service also contacted Dr. Robert Euler, an anthropologist familiar with the Havasupai and who had testified on behalf of the Tribe

before the Indian Claims Commission. Dr. Euler had no knowledge of the mine site having any religious or cultural significance for the Havasupai. Id. a-110 to a-111. Archaeological examination of the site in 1985 found no evidence of any religious activity there. Id. a-95 to a-99, a-115 to a-116. Finally, the Forest Service researched the scholarly literature on the Havasupai and found no information indicating that the mine site had any religious significance for the Havasupai. Id. a-112.

Despite the Havasupai's failure to cooperate with the Forest Service on the issue of the mine site's possible religious significance, the final EIS made Indian religious concerns a principal "Issue and Concern" and contained an expanded discussion of Havasupai religious concerns. Id. a-93 to a-94. The final EIS concluded that while the Havasupai

asserted that the mine would adversely affect their religion, there was no evidence of any Indian religious sites at or near the mine. Additionally, the Havasupai refused to identify any specific sites that might be affected by the mine. Id. a-113 to a-116. In September 1986, the final EIS was published and Energy Fuels' modified plan of operations was approved by the Forest Supervisor. Id. a-21.

The Havasupai appealed the Forest Supervisor's decision to the Regional Forester. They also sought a stay of mine development pending the outcome of the appeal. The Tribe participated fully in the appeal, with several members providing oral and written statements on their religious beliefs. Supp. E.R. A378-418. The Havasupai also submitted briefs and consultants' opinions on

environmental issues. e.g., E.R. 187, 208.[2] The Havasupai also had the unrestricted right to submit any additional material they considered relevant. 36 C.F.R. § 211.18(j),(p) (1987). After considering in detail all the issues raised by the Tribe and all information submitted by interested parties, the Regional Forester upheld with minor modification the Forest Supervisor's decision. E.R. 164-86; Pet. App. a-21 to a-22.

The Havasupai also pursued their request for a stay of mining activities at the mine. The Regional Forester and then the Chief of the Forest Service considered the stay request. Pet. App. a-22. The Tribe fully briefed and argued the stay issue at both levels. The Havasupai also provided oral statements about their religion and other

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2 The Excerpts of Record, which the Havasupai submitted to the Ninth Circuit, is herein referred to as "E.R. ___."

documentary evidence in support of their stay request. Supp. E.R. A232-342. Again, there was no limit on what oral or written submissions could be presented by the Havasupai.

The Regional Forester granted a partial stay, prohibiting underground drilling, but permitting surface construction. Pet. App. a-22. Subsequently, the Chief, affirmed the Regional Forester's partial stay, in a long written decision, which considered in detail the Havasupai's claims on the merits. Supp. E.R. A343-77; Pet. App. a-22.

The Havasupai pursued their appeal on the merits to the Chief of the Forest Service. In support of their appeal, they filed briefs and submitted additional materials. On June 9, 1988, in a detail decision that carefully considered the issues raised by the Havasupai, the Chief of the Forest Service approved the modified plan of operations for

the mine. E.R. 476-96. The Havasupai then filed suit in the United States District Court, seeking judicial review of the Chief's final decision. Pet. App. a-22 to a-23.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There is No Conflict Between the Ninth Circuit's Decision and Decisions of this Court.

Petitioners assert that the Ninth Circuit's decision somehow conflicts with decisions of this Court with respect to extinguishment of Indian title. Pet. 13-14. There is no basis to this assertion. Petitioners attempt to create a supposed conflict by misstating this Court's holding on extinguishment of Indian title and also the holdings of the District Court and the Ninth Circuit on the extinguishment of the Havasupai's aboriginal title in this case.

Indian or aboriginal title is a permissive right of occupancy recognized by the

federal government. Pet. App. a-25. Contrary to the assertion of petitioners, this Court has never held that Congress has the exclusive power to extinguish aboriginal title. Pet. 14. Rather, this Court has held that while Congress' power to extinguish aboriginal title is "supreme," the federal government may extinguish aboriginal title through a variety of means, including:

> [B]y treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy or otherwise. . .

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941) (cited and mischaracterized at Pet. 14).

The District Court and the Ninth Circuit held that the Havasupai's aboriginal title to the land at issue was extinguished through several of the means identified by this Court in Santa Fe Pacific Railroad: First, "by the sword," when the Tribe was removed to the

reservation and excluded from the remainder of what had been its aboriginal land[3]; second, "by the exercise of complete dominion adverse to the right of occupancy," when the federal government established a series of forest reserves, national forests, a national monument and a national park on what had been Havasupai land, and finally, "by purchase," when Congress paid compensation to the Havasupai for their aboriginal land that the federal government had taken. Pet. App. a-12 to a-13; a-23 to a-35.

Thus there is no conflict between this Court and the Ninth Circuit.

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3 The Havasupai declared to the Indian Claims Commission that federal civil and military authorities "threatened [tribal members] with loss of life" and also "killed or forcibly evicted" them from their aboriginal lands, and thereby coerced the Tribe onto the reservation. Supp. E.R. A492.

II. Petitioners' Aboriginal Rights Were Extinguished Before the Grand Canyon Enlargement Act Was Enacted.

Petitioners claim that their aboriginal rights were not extinguished until the Grand Canyon Enlargement Act was passed in 1975. This argument ignores the actual history of the land at issue, congressional action, and petitioners' own testimony. As pointed out above, the Havasupai petitioned the Indian Claims Commission for compensation precisely because their title had already been extinguished: "In 1880 the [United States]. . . deprived petitioner of their title to these lands." p.4, supra.

Federal ownership and control of the land at issue was subsequently confirmed by no less than 13 statutes and executive orders between 1893 and 1934 that established a forest reserve, national forests, a national monument, and a national park on the land.

Supp. E.R. A494; Pet. App. a-27 to a-28. On the basis of the above facts, the Indian Claims Commission determined that the Havasupai's aboriginal title had been extinguished. Pet. App. a-29.

Petitioners attempt to escape the consequences of these facts and the Indian Claims Commission decision by asserting that the Indian Claims Commission did not have authority to extinguish Indian title. Pet. 9, 14. This argument misses the point because the Commission did not extinguish petitioners' aboriginal title, but determined that it had already been extinguished, thus entitling them to compensation.[4] Pet. App. a-29.

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[4] The Havasupai would not have been entitled to compensation had their aboriginal rights not been extinguished. United States v. Gemmill, 535 F.2d 1145, 1149 n.6. (9th Cir.) cert. denied sub nom. Wilson v. United States, 429 U.S. 982 (1976) (Indian tribe's "compensation claim [to the Indian Claims Commission] was, of course, premised upon an extinguishment.").

Congress set up the Indian Claims Commission in 1946 and delegated to it "the responsibility for determining the merits of native American claims" in order to relieve itself "of the burden of having to resolve these claims." United States v. Dann, 470 U.S. 39, 45, 47 (1985). The Commission was given "extremely broad jurisdiction" to hear Indian "claims of every type, shape and variety" against the federal government. United States v. Seminole Nation 173 F.Supp. 784, 789 (Ct. Cl. 1959); Klamath and Modoc Tribe v. United States, 174 Ct. Cl. 483, 488-89 (1986). See also Pet. App. a-35 to a-37.

Among the claims the Commission had authority to "hear and determine" were "claims arising from the taking by the United States. . . of lands owned or occupied by. . . any Indian tribe." 25 U.S.C. § 70a (the Commission was terminated on September

30, 1978). The Commission determined the amount of compensation, if any, to be awarded in each case. 25 U.S.C. § 70r. Payment by Congress of compensation in a case constituted "full discharge" of all claims and demands against the government in any way related to the case. 25 U.S.C. § 70u(a).

Congress' "chief purpose" in establishing the Commission was to have Indian claims resolved "with finality." Dann, 470 U.S. at 45 (citation omitted). It is thus clear that Congress gave the Commission the authority to determine whether Indian title was extinguished in a given case, and intended the Commission's decision on the matter to be final (subject to review by the Court of Claims). 25 U.S.C. §70s(b). Accordingly, there is no merit to petitioners' attack on the decision of the Commission.

After the Commission determined that petitioners' Indian title had been extinguished, Congress in 1969 acted directly on the matter by appropriating and paying compensation to the Tribe for the land the government had taken. Pet. App. a-12, a-30. This action by Congress clearly extinguished petitioners' aboriginal title even if it had not been extinguished before.[5]

The Ninth Circuit and the District Court properly found that petitioners' aboriginal title was extinguished prior to the Grand Canyon Enlargement Act. Contrary to petitioners' assertion, neither court held that the Indian Claims Commission had extinguished the Havasupai's aboriginal rights. Pet. 14.

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5 United States v. Pend Oreille Public Utility District, 926 F.2d 1502, 1508 (9th Cir. 1991) ("[P]ayment of a Commission award of compensation for a taking of aboriginal lands conclusively establishes that the aboriginal title has been extinguished."); accord Gemmill, 535 F.2d at 1149; United States v. Dann, 873 F.2d 1189, 1194 (9th Cir. 1989).

Rather, both courts held that petitioners' aboriginal title was extinguished through multiple means, but, in any case, no later than 1969 when Congress, by statute, compensated the Tribe for the land at issue. Id. a-12, a-26 to a-30. Thus, even if petitioners' were correct in asserting that only Congress can extinguish aboriginal title, their aboriginal rights to the land at issue would still have been extinguished before the Grand Canyon Enlargement Act.

III. Petitioners' Access Claim is Barred as a Matter of Law.

Because petitioners were paid by Congress for the land the federal government had taken from them, their access claim is statutorily barred. The Indian Claims Commission Act provides:

> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the

> matters involved in the controversy. 25 U.S.C. § 70u(a).

Petitioners' current right of access claim clearly "touches" a matter involved in their prior case before the Indian Claims Commission because the mine site is within the area of land that was in controversy in that proceeding. Pet. App. a-40 to a-41. Accordingly, petitioners' access claim to the mine site is statutorily barred. United States v. Dann, 470 U.S. at 45 (payment of compensation under 25 U.S.C. § 70u(a) has "preclusive effects" on any claims that "touch" a "matter previously litigated and resolved by the Indian Claims Commission.")

Petitioners' access claim is also barred by the principle of res judicata because petitioners stipulated in the final judgment of the Indian Claims Commission that they would be barred from asserting any claim with respect to their aboriginal land which they

asserted or could have asserted in that proceeding.

> Entry of final judgment in said amount shall finally dispose of all rights, claims or demands which the petitioner has asserted or could have asserted with respect to the subject matter of Docket No. 91, and petitioner shall be barred thereby from asserting any such right, claim or demand against defendant in any future action.

21 Ind. Cl. Comm. at 337 (quoted at Pet. App. a-42). Because petitioners' current claim was or could have been asserted in their proceeding before the Indian Claims Commission, the claim is now barred.

IV. The Grand Canyon Enlargement Act Does Not Guarantee Petitioners a Right of Access to the Mine Site.

By ignoring the clear meaning of the statute and by substituting an elaborate "implied" meaning, petitioners declare that the Grand Canyon Enlargement Act preserves for them an aboriginal right of access to the mine site. Pet. 23. This alleged right

supposedly rises to the level of an "easement," giving petitioners the power to prohibit Energy Fuels from mining on its own mining claims because "access by Tribal members and [Energy Fuels] cannot coexist." Petitioners' Opening Brief to the Ninth Circuit at 28, 31. Petitioners' argument is without merit.

The Grand Canyon Enlargement Act expanded the Grand Canyon National Park, enlarged the Havasupai Reservation, and designated a portion in the Park as a Havasupai use area. The mine site was not included in any of these changes. The provision of the Act relied on by petitioners states:

> Nothing in Sections 228a to 228j of this title shall be construed to prohibit access by any members of the tribe to any sacred or religious places or burial grounds, native foods, paints, materials and medicines located on public lands not otherwise covered in Sections 228a to 228j of this title.

16 U.S.C. § 228i(c) (1988 Supp.). As the language clearly indicates, this provision simply states that the Act is not to be used to prohibit Havasupai access to areas of public land. Beyond stating how the Act is not to be used, the provision is silent on the issue of access. The provision does not grant the Havasupai access of any kind, nor does it even mention an alleged "right" of access.[6] Moreover, by stating that it should

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[6] The District Court pointed out that petitioners' implied "access" meaning is particularly improbable in light of other sections of the Act that expressly and directly grant rights to public lands:

> Congress knew how to create land in trust for the benefit of the Havasupai. Section 228i(a) provides that lands "are hereby declared to be held by the United States in trust for the Havasupai Tribe." Congress also knew how to create a right of access. The sentence immediately preceding the disputed sentence in § 228i(c) states that "the Secretary shall have the right of access to any lands hereby included in the Havasupai Reservation." No similar grant in trust or affirmative

Footnote continued on next page.

not be construed to prohibit access, the Act clearly permits access to be denied on any other ground, including other statutes, common law principles, and the rights of others.

The District Court carefully reviewed the legislative history of the Act and concluded that the provision in question is simply a statement of statutory neutrality on the issue of Havasupai access to areas of public land other than those covered by the Act.[7] Pet. App. a-50. The legislative

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Footnote continued from previous page.

> right of access is created by the language plaintiff sites. Pet. App. a-51.

[7] Petitioners claim that the Ninth Circuit's affirmance of the District Court contradicts an earlier decision of its own. Pet. 11. This is incorrect. The Ninth Circuit simply observed that another provision of the Act reserved an area of the Park for use by the Havasupai. Northwest Indian Cemetary Protective Ass. v. Peterson, 795 F.2d 688, 694 n.8 (9th Cir. 1986), rev'd sub nom., Lyng v. Northwest Indian Cemetary Protective Ass., 485 U.S. 439 (1988).

history indicates that the statement of statutory neutrality was called for due to past friction between the Havasupai and some agencies of the federal government. Id. a-50 to a-51. There is simply no basis in either the statutory language or the legislative history for petitioners' claim that the Act guarantees them right of access to the mine site.

Petitioners attempt to use the "extinguishment" provision of the Act to support their access claim. Pet. 13. Again, there is no merit to petitioners' argument. The extinguishment provision states that all right, title and interest of the Havasupai to lands not held in trust for them or otherwise covered by the Act are extinguished. 16 U.S.C. § 228(i)(f). The legislative history makes clear that this provision has nothing to do with any alleged right of access to the mine site.

At the time Congress was considering enlarging the Park, petitioners lobbied to have their reservation increased by some 251,000 acres. Pet. App. a-46. This area did not include the mine site. Id. at a-45, a-49. Congress was aware that petitioners were claiming that they still had an aboriginal right to this land because they used it for grazing after the 1969 decision of the Indian Claims Commission. H.R. Rep. No. 1374, 93rd Cong., 2d Sess. 9 (Sept. 25, 1974). Congress never acknowledged any legitimacy to the Havasupai's claim, although there was discussion about it.[8] In any case, the Tribe's argument made no sense because,

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8 Congress treated the issue as moot because, "[w]hether or not title was extinguished," Congress "can enlarge any Indian reservation, if it chooses to do so." Id. Congress enlarged the Havasupai Reservation because tribal members were judged to need more land, not because of their aboriginal rights argument. 120 Cong. Rec. 35,195 (1974).

as the District Court noted, tribal members were using the land (which did not include the mine site) on the basis of government grazing permits, not because of any supposed aboriginal rights. Pet. App. a-46.

Congress granted the Havasupai much, but not all of the land they claimed, by adding 185,000 acres to the Havasupai Reservation. An area in the Park was also designated as a Havasupai use area. Id. a-48 to a-49. Because the Havasupai did not receive all the land they claimed to be theirs by aboriginal right, Congress wished to make clear it would not recognize any future claims by the Havasupai to the remaining area. Accordingly, Congress stated that any claims by the Havasupai to the land were extinguished. As pointed out above, none of the land claimed by the Havasupai included the mine site. P. 28, supra. Accordingly, the

extinguishment provision cannot possibly provide any support for petitioners' current access claim to the mine site.

V. The District Court Properly Limited Judicial Review to the Administrative Record.

The Administrative Procedures Act provides that judicial review of agency action is to be based on the administrative record, even where it is alleged that the agency acted "not in accordance with law [or] contrary to constitutional right." 5 U.S.C. § 706. Numerous decisions of this Court have stressed that a reviewing court should base its decision on the existing administrative record, and not on some new record made initially in the court proceeding. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). In the instant case, the administrative record is

over 5,000 pages in length and includes the Forest Service's final decision that devotes 21 pages to explaining the basis of the agency's decision. Supp. E.R. A538; E.R. 476.

The sole question raised by petitioners is whether they are required to make "a showing of agency bad faith" to be entitled to do discovery beyond the administrative record. Pet. iii. This Court has already answered petitioners' question. Overton Park holds that when an agency provides a formal factual explanation of a decision at the same time the decision is issued, "there must be a strong showing of bad faith or improper behavior" before any inquiry beyond the record will be permitted. 401 U.S. at 420. In the instant case, the Forest Service provided a clear, detailed explanation of its decision (E.R. 476-96), and petitioners have

not shown or attempted to show any agency bad faith. Pet. App. a-9.

Petitioners claim that the record that was before the District Court was not the complete administrative record. Pet. 24-25. There is no merit to this allegation. The Declaration of Bronson LaMoure explains that he assembled the administrative record, containing all the documents that were part of the administrative process. Supp. E.R. A535. The administrative record contains, among other things, both the final and draft EIS and all the underlying reports, technical studies, comments, and agency responses. E.R. 617-787. Over 42 documents that predate the EIS are included in the administrative record. Supp. E.R. A480-83. All the documents that were part of petitioners' two administrative appeals, including pleadings, factual statements, expert opinions, and the

decisions and statements of the agency, are also included in the administrative record. Id. A536-39.

David Unger, the author of the Forest Service's final decision, explains in his Declaration that "[i]n reaching [his] June 9, 1988 decision," he "relied exclusively on information that was in the administrative record that was complied by [Bronson LaMoure] and that was filed in this litigation." Supp. E.R. A479. In other words, the only documents that the agency's final decisionmaker looked at or considered in reaching his decision are contained in the administrative record that was before the District Court. Thus it is clear that administrative record contains the complete record of this case, from the Energy Fuel's initial

proposal to the final decision of the agency.[9]

The District Court did not deny petitioners an opportunity to take discovery as petitioners now claim. Pet. 4, 5, 7. The District Court made clear that it would permit discovery if petitioners could satisfy any one of four grounds for discovery by showing: (1) that the record does not explain the agency's decision, (2) that it appears that the agency relied on materials not included in the record, (3) that discovery is necessary to explain technical terms, or (4) that there is bad faith or improper

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9 Petitioners attempt to create the impression that documents are missing from the administrative record by referring to a 1988 letter from the Forest Supervisor to petitioners' counsel. Pet. 27. The Forest Supervisor simply states that his office has file drawers of documents. He does not identify or count the documents, though he explains that they are duplicative of documents in the administrative record. See Ex. B to petitioners' Reply Brief to Ninth Circuit. This letter does not indicate any incompleteness in the administrative record.

behavior by the agency. Order of July 28, 1988 at pp. 4-5. See Animal Defense Council v. Hodel, 840 F.2d 1432, 1436-37 (9th Cir. 1988), modified, 867 F.2d 1244 (9th Cir. 1989).

After full briefing and oral argument, the District Court determined that petitioners had failed to satisfy any of the above grounds. Order of July 28, 1988 at 5. Nonetheless, the District Court did not prohibit discovery by petitioners. Rather, it ruled that it would still permit discovery upon "adequate justification for the particular discovery request." Id. at 6.

Petitioners never requested to take any particular discovery. Rather, they filed a motion to take general discovery at all levels of the Forest Service. Order of September 7, 1988 at 3 (Supp. E.R. A486). The District Court denied petitioners' motion

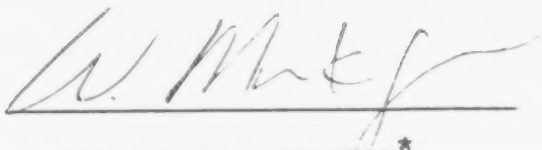
because they "failed to demonstrate any specific deficiency in the record as filed nor have they established any other basis upon which to permit discovery." Id. The Ninth Circuit affirmed on the ground that petitioners' argument for needing to do discovery was "purely speculative" and without any support. Pet. App. a-9.

Thus it is clear that judicial review was properly limited to the administrative record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED:



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